PD 2/2020

Report on the draft organic law on the protection of personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offenses and the execution of criminal sanctions, as well as protection and prevention against security threats public

Background

The Draft organic law on the protection of personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offenses and the execution of criminal sanctions, as well as protection, is presented to the Catalan Data Protection Authority and prevention against threats against public security.

Having analyzed the Preliminary Project, which is accompanied by the regulatory impact analysis report, and taking into account the current applicable regulations, and in accordance with the report of the Legal Advisory I issue the following report

Notes on the text

I

First of all, and as a preliminary consideration, it must be mentioned that the Draft Law analyzed complies with the obligation to transpose Directive (EU) 2016/680 of the Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of this data and by which Framework Decision 2008/977/JAI of the Council is repealed, in accordance with what is established in its article 63.

It is clear, therefore, that the text being promoted must respect the provisions contained in this Directive, without prejudice to the fact that, as established in Article 1.3 thereof, the Directive does not prevent member states from offering greater guarantees than those in it they are established for the protection of the rights and freedoms of the interested party regarding the processing of personal data by the competent authorities.

Based on these premises, this report will analyze those issues that raise problems of compatibility with this Directive, those that may affect the functions recognized to this Authority by the Statute of Autonomy of Catalonia and its development legislation or those issues that, in view of the experience of this Authority in the exercise of functions in the regulated area, may be susceptible to improvement in the final wording.

Chapter I. General provisions

Article 1.2

This section of article 1, dedicated to the object of the Organic Law, includes the applicability of the "Organic Law 3/2018, of December 5, on the Protection of Personal Data and the guarantee of digital rights, provided that the result of said application is not contrary to the purposes of the treatment included in the previous section." (LOPDGDD).

Apart from the fact that the systematic location of this section should not be in article 1 but in the article relating to the scope of application (article 2.2 of the Preliminary Draft), this section conditions the applicability of the LOPDGDD to that is not contrary to the purposes of the first section. The criterion for applying the LOPDGDD should not be non-contradiction with the purposes, but non-contradiction with Directive 2016/680.

For this reason, it is proposed to delete section 2 of article 1 and introduce a new article 2.2.bis with the following wording:

"2 bis. To the treatments included in the object of this Organic Law, the provisions established in Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights will apply, provided that the result of said application does not is contrary to those established in Directive (EU) 2016/680 and in this Organic Law."

Article 2.2

The first paragraph of this section establishes the following:

"It will also apply to the treatment of personal data from the images and sounds obtained through the use of cameras and video cameras by the Security Forces and Bodies and by the competent bodies for surveillance and control in prisons and for the control, regulation, vigilance and discipline of traffic with the purposes indicated in article 1."

Although it is positively valued that an express mention is made of applicability in this area, especially taking into account that Organic Law 4/1997, of August 4, which regulates the use of video cameras, is expressly repealed by the Security Forces and Bodies in public places and its development rule, it should be noted that the control, regulation, surveillance and discipline of traffic, despite the fact that they are currently regulated in LO 4/1997, it would not be part of the purposes indicated in Directive 2016/680.

For this reason, since the specialties applicable to these cameras are not regulated in the article 22 LOPDGDD, and to the extent that Organic Law 4/1997 is repealed, the specialties applicable to the cameras intended for traffic control, regulation, surveillance and discipline, should regulate-

se in an additional provision, also clarifying that the regime provided for in the RGPD and the LOPDGDD would apply to what is not specifically regulated.

On the other hand, the second paragraph of this article is confusing. It does not seem necessary to foresee in this article the regulations applicable to cases other than those referred to in the first paragraph. In these cases, the RGPD will apply if it is not part of the purposes of this Organic Law, and if it is about purposes included in the Organic Law, the organic law or specific regulations will apply if there were any. That is why it is proposed to delete the second paragraph.

The following wording is proposed for section 2:

"2. It will also apply to the processing of personal data from the images and sounds obtained through the use of cameras and video cameras by the Security Forces and Bodies and by the competent bodies for surveillance and control in prisons (...) with the purposes indicated in article 1."

Article 2.3.c)

This article recognizes the State Tax Administration Agency as the competent authority for the purposes of the Organic Law.

Although Recital 11 of the Directive provides that not only public authorities such as judicial authorities, the police or other forces and security bodies must be included, but also any other body or entity in which the Law of Member State has entrusted the exercise of the authority and public powers referred to in the Directive, it does not seem that an attribution formulated in such broad terms to the treatments carried out by the AEAT can be justified (in fact it is not recognized in the rest of tax administrations or tax agencies of other administrations) from the point of view of the scope of application of Directive 2016/680.

In the event that it refers only to certain functions related to the prevention or prosecution of tax fraud that may constitute criminal offences, these functions should be expressly indicated and, where appropriate, should be extended to the rest of tax administrations.

Article 2.4

This section provides for the application of the Directive to subjects (subjects other than the competent authority whose purpose is protection and prevention against threats against critical infrastructures) that are not considered competent authorities. This seems contrary to the Directive and GDPR. Being outside the scope of the Directive, the RGPD would apply directly to them.

On the other hand, it foresees that Chapters III (people's rights), VII (claims) and VIII (sanctioning regime) will apply to these subjects. If the RGPD applies, the regime provided for in the RGPD should be applied. In any case, if it were subjects to whom the legislation has entrusted the exercise of authority and public powers for the purposes of the purposes provided for in the

Directive, they should be qualified as a competent authority and the Preliminary Draft should apply to them in its entirety, without the partial application of certain aspects of the Organic Law appearing to be justified.

For this reason, it is proposed to delete this section.

Article 2.5

To facilitate the understanding of the text, it is proposed to replace the expression "within the scope of article 1 of this organic law" by the expression "in the criminal order, including penitentiary surveillance".

On the other hand, the subsidiary application of this Organic Law in this area should not be limited to Chapter III, but should refer to the entirety of the Organic Law, in a similar way to how the article 2.4 of the LOPDGDD regarding the treatment by the other jurisdictional bodies.

Article 2.7.e)

This section excludes from the scope of application of the Organic Law the treatments related to "the fight against terrorism that affect National Security and those related to serious forms of organized crime aimed at seriously destabilizing the normal functioning of Estado y de las Instituciones", in a similar way to how it did in article 2.2.c) of Organic Law 15/1999.

Although at the time this provision did not pose any problems from the point of view of the transposition of Directive 95/46/EC, since police activity (including the fight against terrorism) was part of the so-called third pillar in respect of which this Directive did not apply, Directive 2016/680 currently includes all police activity, regardless of whether it is treatment related to the fight against terrorism or against serious organized crime.

The consequences of this exclusion are even more serious, if possible, considering that this section also excludes the applicability of the RGPD, with which this area would be orphaned by any internal regulation regarding the protection of personal data .

Therefore, this section should be deleted.

Article 2.8

This section establishes that "the treatments carried out by the subjects to whom the legal system imposes a specific duty of collaboration with the competent authorities for the fulfillment of the purposes established in article 1, will be governed by the

provided in the rule that establishes said obligation and by what is established in Chapters III, VII and VIII of this organic law, being of supplementary application what is provided in Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, and its adaptation provisions."

It does not follow from Directive 2016/680 that it applies to subjects who do not have the status of competent authority, but are simply limited to collaborating with the competent authorities. In reality, Recital 11 of the Directive states: "Thus, Regulation (EU) 2016/679 applies in cases where an organism or entity collects personal data for other purposes and proceeds to its treatment for the fulfillment of a legal obligation to which he is subject."

For this reason, it is proposed to delete this section.

III

Chapter II. principles

Article 4.2.b)

The transposition of sections 1 and 2 of article 9 of the Directive should be incorporated in this section, since they have not been incorporated in the article equivalent to article 9 of the Directive (article 10 of the 'Draft project) and it seems systematically more appropriate to incorporate them into article 4

Article 4.4

This article does not faithfully transpose article 4.4 of the Directive, since this article requires, in a manner consistent with the content of the principle of proactive responsibility, not only that the person in charge must guarantee compliance, but also that "he must be in conditions to demonstrate compliance", in a similar way to how article 5.2 RGPD does.

Article 5

Under the name of "Collaboration with the competent authorities.", sections 1 and 2 of article 5 include several cases of legitimization of data collection by the competent authorities.

These cases should be collected in article 9 dedicated to the legality of the treatment.

In any case, the authorization contained in section 1, although it may be justified for the investigation or prosecution of criminal offences, seems excessively broad for the treatments related to the execution of criminal convictions.

On the other hand, it would not seem necessary to duplicate the reference to the data necessary for the investigation or prosecution of criminal offenses in the second section, since it constitutes a

duplicity And the first punctuation mark should be deleted." Siempre" from the second section and replace with ", siempre"

Sections 3 and 4 of this article should be located and recast in article 17.

Article 6

The Directive (art. 5) establishes at this point that the Member States must provide that "appropriate deadlines are set for the deletion of personal data or for a periodic review of the need for the conservation of personal data. (…)".

Article 5 of the Directive does not refer only to criminal jurisdictional files, but to any treatment included in its scope of application.

However, paragraph 1 of article 6 of the Draft establishes that "The person responsible for the treatment will determine that the conservation of personal data takes place only during the time necessary to fulfill the purposes provided for in article 1. ", unlike section 2, which does establish retention periods in relation to criminal jurisdictional files only.

The provision of this section 1 could be insufficient.

In particular, there is a lack of regulation of the retention period of the police records contained in the police files and which in practice raises many claims for protection before the data protection authorities.

On the other hand, with regard to those cases in which a provisional file of the case has been produced, but because the limitation period has not passed they must be kept in the police files, it is proposed to introduce the obligation to reflect the circumstance of the provisional file in the police files as long as it is not deleted.

Also note that articles 6.2 and 50.q) refer to the blocking obligation, but it does not specify what it consists of, nor is there any reference to the LOPDGDD at this point.

Finally and in line with the observations made in the opinion WP 258 on the Directive, it would be of interest to establish additional guarantees to limit the retention of minors' data, once they have reached the age of majority.

Article 7

Bearing in mind that the list in Article 6 of the Directive is not a taxed list but an open one, it is proposed that, in line with Recital 31, a new letter a) bis be included, referring to accomplices. This would allow them to be distinguished from the people referred to in letter d), who in principle have not participated in the commission of the crime.

Article 9.1

In general, all the regulations relating to the legality of the treatment in articles 5, 9, 10 and 11 are difficult to understand and systematic, so an in-depth review of these articles is recommended.

Focusing on article 9, for the treatment to be considered lawful, this article only establishes the need for it to be carried out by the competent authority within the framework of its powers.

However, it does not take into account that article 8.1 of the Directive requires that "it is based on the Law of the Union or of the Member State". In this sense, both the interpretation of this expression made in the LOPDGDD (arts. 8 and 9.2), and that which follows from article 53 CE, and the jurisprudence of the Court of Justice of the European Union (STJUE of April 8, 2014, Digital Rights case) and of the Constitutional Court (SSTC 292/2000 or 76/2019, among others), it is required that a rule with the rank of law must specify the limitation of the right to data protection.

In this sense, section 2 of the same article of the Preliminary Project refers to the content that must have "any law that regulates the treatment of categories of personal data ..." but it also does not establish the need that it must always be a rule with rank of law that legitimizes the treatment.

On the other hand, the cases of treatment provided for in sections 1 and 2 of article 5 of the Preliminary Project should be collected here, although it is necessary to note that the distinction between the two sections of article 5, nor the scope of each of them.

On the other hand, and despite the fact that in principle consent does not constitute a valid legal basis for the processing of data for the purpose of the prevention, investigation, detection or prosecution of criminal offenses (recital 35), it does not seem that, despite not being the legal basis on which the processing of data by the competent authority will normally be based, must exclude consent or vital interest in other types of processing, for example related to the execution of sanctions criminal (for example, in the voluntary participation in a reconnaissance round, in the collection of biological samples from suspicious persons without judicial authorization or to consent to the installation of a bodily geolocation device for the execution of criminal measures)

Finally, it would be positive, for the purposes of regulatory simplification, to include in this article, or if applicable in an additional provision to that effect, also the authorization provided for in DA 22ª of the LOPDGDD, according to which the competent public authorities to the data that is requested on the occasion of police or judicial investigations of missing persons, the institutions or religious congregations to which access requests are made must attend to the requests promptly and diligently. ".

Article 10

It doesn't seem clear what kind of data this article is referring to. This lack of definition also occurs in article 10.3 of the Directive, but domestic law should specify it.

Article 11

The same considerations made with respect to article 9 can be reproduced with respect to article 11.a) since, despite the fact that in this case it is required that it be a norm with the rank of law, they are not included neither the definition of the essential elements that this law must meet nor adequate guarantees, as it follows from the one established by the Constitutional Court in STC 76/2019. In this regard, Recital 37 of the Directive includes some of the guarantees that should be foreseen.

The provision currently contained in article 22.3 LOPD should be collected in this article.

The authorization of Article 11.b) of the Directive relating to the protection of the vital interests of the affected person or other person should also be collected.

On the other hand, provision should be made in this article for the processing of the health data of inmates in penitentiary institutions for welfare or public health reasons and for the treatment of inmates.

Article 12.1

The wording of section 1 of this article is imprecise (as it does not accurately reflect what is established in article 11.1 of the Directive) and difficult to understand.

Following what is established in recital 38 of the Directive, an indent should be added to indicate that, among the guarantees that must be established by the rule enabling this type of treatment, must be included the d 'inform the interested party in a specific way, in particular so that the interested party can express his point of view, obtain an explanation of the decision taken after this evaluation, or exercise his right to challenge the decision.

On the other hand, this article does not faithfully capture the requirements of Article 11 of the Directive regarding automated decisions based on special categories of data, since in this case not only guarantees are required to safeguard the rights and freedoms of the interested parties, but also to safeguard their legitimate interests.

For this reason, the following wording is proposed for section 1 of this article:

"1. Automated individual decisions will not be adopted, including the creation of profiles, that produce negative legal effects for the interested party or have a significant, adverse impact on them, unless expressly authorized by a rule with the force of law or by a rule of the European Union law, which guarantees human intervention and which establishes the appropriate measures to safeguard the rights and freedoms of the interested party, in particular, inform them specifically about the treatment so that the interested party can

express your point of view, obtain an explanation of the decision taken after said evaluation, or exercise your right to challenge the decision."

When they are based on special categories of data, other appropriate measures must be taken to safeguard the legitimate interests of the interested parties."

IV

Chapter III. People's rights

Article 13

A linguistic correction should be made in section 3 (delete "to"), and in section 4 (delete "que ésta será").

Article 14.1

This section does not specify the moment in which the information must be provided. Whenever possible, the information should be provided prior to collection, if it is collected directly from the person concerned, or within one month (or in the first communication if it occurs earlier), when the information obtained through third parties.

Article 14.2

The reference to "attendiendo a las circunstances del caso concreto", seems to leave it in the hands of the person in charge to assess whether or not to provide this complementary information, when this does not follow from article 14.2 of the Directive.

The fact that this information is provided at the request of the interested party may be in accordance with the Directive, but this paragraph relating to the circumstances of the specific case should be removed.

On the other hand, even if the application of the one-month term provided for in article 13.4 of the Preliminary Project can be sustained in this case, it would be more clarifying to establish a deadline for providing this information in the same article 14.2.

On the other hand, in letter d) of this same section, it would seem more correct to reproduce the wording of article 13.2.d) of the Directive, since the current wording of the Preliminary Project, modifies in a restrictive sense the meaning original of the precept.

Article 15.1.g)

Given the provisions of recital 43 of the Directive, consideration should be given to introducing an indent to indicate that the information on the origin of your data must in no case reveal the identity of any natural person, especially when it comes to confidential sources.

Article 15.3

Although the wording of the first paragraph of this precept is aligned with the wording of article 13.2 LOPDGDD, it seems advisable to clarify that the remote access system should not only allow access to the data but also to the other aspects which are regulated in section 1 of article 15. On the other hand, the last paragraph should be deleted and replaced by the equivalent paragraph contained in the wording of article 13.2 LOPDGDD.

That is why the following wording is proposed:

"3. The right of access will be deemed granted if the data controller provides the affected party with a remote, direct and secure access system to personal data and other information established in section 1 of this article. To such effects, the communication by the person in charge to the affected person of the way in which he will be able to access said system will be enough to have the request for the exercise of the right attended to."

Article 15.4

This article qualifies as excessive the requests in which a different means than that offered by the person in charge is chosen to obtain the data that involves a disproportionate cost.

It seems reasonable that if the means chosen by the interested party is excessive, the additional cost that this entails can be passed on to him, as can be seen from article 12.4 of the Directive, but on the other hand, the provision of article 15.4 seems absolutely disproportionate according to which "In this case, the satisfaction of the right of access without undue delay will only be required of the person responsible for the treatment". To this it must be added that it does not seem clear to which assumption th "In this case", therefore, seems to refer to the case in which the interested party has assumed the excessive cost, when in reality, it would seem that it should refer, if it is maintained, to the cases in which the interested party does not meet this cost.

That is why the following wording is proposed:

"4. When the interested party chooses a different medium from the one offered and which involves a disproportionate cost, the request will be considered excessive, so the said interested party will assume the excess cost that their choice entails. If the cost is not met, the person in charge can refuse to pay attention to the right"

Article 16.3.b)

The reference to which instead of the deletion of the data can proceed to its limitation "in particular, for security", which is not included in article 16.3 of the Directive, does not seem to have the necessary concreteness to lead to term a limitation of the right of deletion. What type of security are you referring to? Public safety? Information security, legal security? That is why it is proposed to clarify or eliminate this paragraph.

Article 17

In both section 1 and section 2, the punctuation marks “.” should be removed. that exist within each of them, and be replaced by "," to give meaning to the current wording of the precept.

In this section 2, the reference to articles 14 and 15 should be completed with a reference to article 16, in line with that established by article 17 of the Directive.

Article 18.1

This section should not refer to articles 15.3 and 16.1, but , in line with what is established in the article 17 of the Directive, it should refer to cases of denial or limitation of the rights provided for in articles 14, 15 and 16.

On the other hand, since this section refers to the need to provide certain information in case of denial or limitation of rights, it would seem systematically more correct to place it in article 17.

In any case, and in line with what is proposed in Opinion WP 258, the possibility of exercising these rights through the control authority should be expressly provided for, without the need for it to have previously been restricted by the person in charge of the treatment the knowledge of the reasons on which the limitation of the right is based.

This is why it is proposed:

a) Move the first section of article 18 to a new section 5 of article 17, with the following wording:

"5. In the cases of denial or restriction of the rights established in articles 14, 15 and 16 of this organic law, the person responsible for the treatment will inform the interested party of the possibility that their rights will be exercised through the protection authority of data."

b) Insert a new section 1 and adapt section 2 of article 18:

"1. The rights established in articles 14, 15 and 16 of this organic law can be exercised through the data protection authority.
2. When, by virtue of what is established in the previous section or in article 17.5, it is the data protection authority that exercises the rights, it must inform the interested party, at least, of the completion of all the necessary checks or the corresponding review and your right to file a contentious-administrative appeal."

Article 19

Both in the heading and in the text of the article it should be clear that this article refers only to information for which the jurisdictional bodies of the criminal order are responsible. In this sense, the wording of Article 18 of the Directive is clearer.

On the other hand, the distinction between sections 1 and 2 is confusing, since in both cases the exercise of rights should be carried out according to procedural rules.

v

Chapter IV Responsible and person in charge of the treatment

Article 21.1

This article incorrectly transposes article 20.1 of the Directive, since in this article the application of pseudonymization or minimization or other measures appear as an obligation, whenever possible, while in the wording of this article the use of the expression "se podrá adoptor" seems to indicate that it has a discretionary nature. On the other hand, given the wording of the last paragraph, the application of pseudonymization and minimization seems to be considered as alternative measures when in reality they are not.

Therefore, the following wording is proposed:

"1. At the time of determining the means for the treatment, as well as at the time of the treatment itself, the technical and organizational measures that are appropriate should be applied according to the state of the art and the cost of the application, the nature, the scope, the context, the purposes of the treatment and the risks for the rights and freedoms of natural persons such as, for example, the minimization and pseudonymization of data, effectively and to integrate the necessary guarantees in the treatment, in such a way that this meets the requirements of this Directive and the rights of the interested parties are protected.

Article 21.2

The expression of the concept "person" in the second paragraph of article 21.2, should not be interpreted as equivalent to "human intervention" but as equivalent to "intervention of the interested person". Well, it is only the action of the person concerned (not of any other human person) that allows us to consider that a certain treatment does not occur by default.

That is why it is proposed to replace "human intervention" with "interested intervention".

Article 22.2

Punctuation marks “.” should be removed. that exist within the section and be replaced by "," to give meaning to the current wording of the precept.

Article 23.2

This article seems to regulate only the possibility that the person in charge has established a specific authorization to refer to another specific person in charge. The possibility of a general authorization should also be included (supplemented later with the communication to the person in charge of the person in charge chosen so that he can object), since this is a possibility expressly provided for in the article 2.2 of the Directive.

Article 23.3

Despite the fact that the second indent of this section establishes that "the contract or other legal act will bind...", in order to clarify the nature of the legal act to which it refers, the first indent of the section should include the adjective "binding" to qualify the legal act.

For this reason, the following wording is proposed for the first paragraph of this section:

"3. The treatment by a manager must be governed by contract or other binding legal act, in writing, including in electronic format, in accordance with European Union law or Spanish legislation (…)"

Article 23.3.f)

Despite the fact that article 23.3.f) of the Directive refers to the conditions established in sections 2 and 3 to hire another processor, section 3 does not establish any specific conditions for subcontracting (except for the mention which makes letter f) of this section itself).
On the other hand, it will later be proposed to incorporate a section 6 that would regulate some conditions for hiring a new manager, so it would be appropriate to incorporate a reference to this new section 6.

Therefore, the following wording is proposed:

"f) Respect the conditions indicated (...) in the second section and in the sixth section to hire another treatment manager."

Article 23.3.g)

In section 3 there is no mention of the obligation of the person in charge of the treatment to adopt the technical and organizational measures established by the person in charge of the treatment as well as any others that are necessary to guarantee confidentiality, integrity and availability of information. It is certainly an issue not required by article 23.3 of the Directive, but it is of paramount importance in the outsourcing of services that entail access to information by third parties, without this omission being resolved by the referral to the LOPDGDD that carries out paragraph 5 of article 23.

For this reason, it is proposed to add a letter g) to article 23.3, with the following wording:

"g) Adopt the technical and organizational measures established by the controller as well as any others that are necessary to guarantee the confidentiality, integrity and availability of personal data."

Article 23.5

This section establishes that "The person in charge of the treatment will be governed by what is not provided for by this organic law, by what is established in Organic Law 3/2018, of December 5.".

The editorial makes a referral in totum regarding those aspects not regulated by the Preliminary Project. This would cover not only the specific regulation of the person in charge of the treatment (art. 33 LOPDGDD), but also any of the general obligations not regulated in the Preliminary Draft and which instead are regulated in Organic Law 3/2018. For this reason, the following wording is proposed to limit the referral to those aspects related to the person in charge of the treatment:

"5. Where not provided for by this organic law, the regulation of the person in charge of the treatment will be governed by what is established in article 33 of the Organic Law 3/2018, of December 5."

Article 23.6

It is proposed to introduce a new section 6 in article 23, to regulate the regime applicable to sub-processors, since the reference made by section 5 to the regulation contained in the LOPDGDD, does not solve this aspect. For this reason, and in line with article 28.4 RGPD, it is proposed to introduce the following section:

"6. When a person in charge of treatment uses another person in charge to carry out certain processing activities on behalf of the person in charge, the same data protection obligations as stipulated in the contract will be imposed on this other person in charge, by means of a contract or another binding legal act or another legal act between the person in charge and the manager referred to in section 3, in particular the provision of sufficient guarantees of the application of appropriate technical and organizational measures so that the treatment is in accordance with the provisions of this Regulation.

If that other manager fails to comply with his data protection obligations, the initial manager will continue to be fully responsible to the person in charge of the treatment for what concerns the fulfillment of the obligations of the other manager."

Article 25.1

Considering that the general data protection regulations (RGPD and LOPDGDD) already impose the duty to maintain a record of processing activities (art. 30 RGPD) and an inventory (art. 30 LOPDGDD), and that this article provides the creation of another register and another inventory specific to the scope of application of the Directive, in addition to another register of operations (art. 26), with the aim of simplifying the regulation several are proposed measurements:

a) Modify section 1 in the following sense:

"1. In order to keep a record of all the personal data processing activities carried out under its responsibility, the controller must keep and publish an inventory of its processing activities, accessible by electronic means, which will contain the following information: (…)"

b) Delete paragraph 4 of article 25

This wording would simplify the incomprehensible duplicity of registration/inventory and at the same time allow the designation "registry" to be reserved for the registration provided for in article 26.

c) At the same time and to simplify the obligations derived from the RGPD and LOPDGDD along the same lines, article 31.2 of the LOPDGDD could be modified in the following sense:

"2. The subjects listed in article 77.1 of this organic law will keep a record of their processing activities through an inventory accessible by electronic means which will include the information established in article 30 of Regulation (EU) 2016/679 and its basis legal."

Article 25.1.a)

It should be noted that, unlike article 13.1.b) of the Directive, which only requires reporting the contact details of the data protection officer, but not his identification, article 24.1. a) of the Directive does require that the identification of the data protection officer and not just his contact details be included in the register. That is why the following wording is proposed:

"a) The identification of the person responsible for the treatment and their contact details and, if applicable, the co-responsible person and the data protection officer."

Article 25.1.f)

The use of the expression "categories of data transfers", despite the fact that it is the same expression used by article 24.1.f) of the Directive, does not seem clear. That is why the following wording is proposed:

"f) The (...) transfers of personal data to a third country that is not a member of the European Union or an international organization, if applicable including the identification of said third country or international organization and the specification of the mechanism that allows said transfer ."

Article 25.4

Given that the activities referred to in article 2.7.d) and e), would be as follows from article 2.7, outside the scope of application of this organic law, the last paragraph of this section it turns out

not necessary. If maintained, it should refer to all treatments that are not part of the scope of organic law.

This observation is made in a subsidiary manner with respect to the proposal that has been made to delete article 25.4 due to the observations in article 25.1.

Article 26

This article does not adequately transpose article 26 of the Directive, due to the fact that by altering the order of the sentence of the Directive and placing the expression "in criminal proceedings" at the beginning, the rest of the cases should occur within the criminal process. This is not what follows from Article 26 of the Directive. Therefore, the following wording is proposed:

"2. These records will be used solely for the purposes of verifying the legality of the treatment, self-control, guaranteeing the integrity and security of personal data and in the context of criminal proceedings."

Article 28

Point out with respect to this article that Opinion WP 258 has pointed out, in line with Recitals 51 and 52, the desirability of member states requiring an impact assessment in those cases where it is intended to make automated decisions that include special categories of data

Article 29.1

This article does not transpose article 28.2 of the Directive, according to which, "The Member States shall provide that the control authority be consulted during the preparation of any proposed legislative measure that must be adopted by a national Parliament, or of a regulatory measure based on said legislative measure, which is related to the treatment.".
Despite the fact that article 42.m) of the Preliminary Project refers to the function of issuing reports regarding legal and regulatory provisions, the inclusion of this case in article 29.1 would make it possible to clarify the applicability to this case of the regime of the previous consultations.

For this reason, it is proposed to add a letter c) to section 1 of article 29, with the following wording:

"c) The preparation of any proposal for a legislative measure or a regulatory measure based on said legislative measure, which refers to the treatment."

Article 29.4

The last paragraph of this section establishes that in the event that the control authority does not respond to the query within the stipulated period, it will be understood that the treatment does not infringe the provisions of this organic law.

It does not seem that the mere passing of the deadline for issuing the report can determine that a treatment does not infringe organic law, especially taking into account the brevity of the deadline for examining certain treatments that can be very complex. The violation of the organic law will occur or not regardless of the issuance of the report. For this reason, the passage of the deadline for issuing the report without it having been issued could lead to the impossibility of sanctioning the offending subject until he has been warned of the illegality, but it must not prevent that, in case of infringing the organic law, it must be adapted to it or, where appropriate, cease.

That is why it is proposed to delete the last paragraph of article 29.4.

Article 32.3.c)

For the cases in which the individual communication may be disproportionate, it does not seem that publication in an official bulletin should be envisaged as the only dissemination measure, since there are other channels, such as for example the electronic headquarters of the competent authority, the social networks, the media or others that may be more immediate and more effective.

Therefore, the following wording is proposed:

"c) That it involves a disproportionate effort, in which case, it can be published in the corresponding official bulletin, in the electronic headquarters of the person in charge or by any other means that allows the interested parties to be informed quickly and effectively."

Article 33.3

It would be positive to introduce a section 5 to clarify that the data protection delegate can also exercise this function with respect to treatments not subject to organic law.

On the other hand, and taking into account that Recital 63 of the Directive shows that the data protection delegate must be an employee who works for the person in charge, it would seem appropriate to clarify this issue, to clarify the different regime applicable with respect to treatments subject to the RGPD.

That is why it is proposed to modify section 3 in the following sense:

"3. An employee who is part of the manager's staff may be a data protection delegate, and may exercise his functions full-time or part-time, including the exercise of the functions of a data protection delegate within the scope of Regulation (EU) 2016 /679, provided that the exercise of said functions does not give rise to a conflict of interests.

A single data protection delegate may be appointed for several competent authorities, taking into account the organizational structure and size of these."

Chapter V. International transfers

Article 36.1.d)

To simplify the wording of this section, the paragraph "the European Commission acts in accordance with the provisions of Directive (EU) 2016/680 of the European Parliament and Council, of April 27, 2016, should be deleted. relating to the protection of individuals with regard to the processing of personal data by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of said data and by which the Council's Framework Decision 2008/977/JAI is repealed. Specifically, when".

On the other hand, references to articles 37 and 38 must be made in articles 38 and 39.

For all this, the following wording is proposed:

"d) That (...) the European Commission has adopted an adaptation decision in accordance with article 36 of Directive (EU) 2016/680 or, in the absence of said decision, when the appropriate guarantees of agreement have been provided or exist with article 38 of this organic law or, in the absence of both, when the exceptions for specific situations apply in accordance with article 39 of this organic law and,"

On the other hand, the transposition of article 36.7 of the Directive is missing. For these purposes, a section with the following wording could be added:

"The repeal, modification or suspension of an adaptation decision will not have retroactive effect, nor will it prevent international data transfers from being carried out under the provisions of articles 38 and 39 of this organic law."

Article 38.1

To simplify the wording of this section, in the first paragraph, the paragraph "con arrego a lo dispositivo en el article 36, partado tercero, de Directive (EU) 2016/680 of the European Parliament and of the Council" should be deleted , **of April 27, 2016".**

On the other hand, the wording literally reproduces the expression "the member states" of article 37.1 of the Directive. This expression is addressed to the member states, but it does not make sense to incorporate it into the drafting of the internal legislation of one of the member states.

Therefore, the following wording is proposed:

"1. In the absence of a decision (...) of adequacy, the competent authorities may carry out a transfer of personal data to a third country or an international organization when:"

Article 39.1

To simplify the wording, in the first paragraph of this article, the reference to article 37 of the Directive, must be carried out in article 38 of the Organic Law, with which the following wording would remain:

"1. In the absence of an adequacy decision (...) or ~~app~~propriate guarantees in accordance with article 38 of this~~ organic law, Spanish au~~thorities and officials may also transfer personal data to a third country or an international organization, only when the transfer is necessary:

Article 39.1.a) and b)

Letter a) does not cover the case provided for in letter a) of article 38.1 of the Directive. For this reason, a new letter a) should be introduced with the following wording:

"a) To protect the vital interests of the interested party or another person."

On the other hand, and with respect to the content of the current letter a) of this section, relating to the protection of the fundamental rights of the interested party or other person, they could be included in letter b), referring to legitimate interests.

Despite the fact that article 38.1 of the Directive establishes that "only" a transfer or category of transfers of personal data may be carried out to a third country or an international organization when the transfer is necessary for any of the cases it lists, the protection of fundamental rights can be included together with legitimate interests because, despite having a different nature, the existence of a legitimate interest is evident when it comes to fundamental rights. For this reason, the following wording is proposed for letter b):

"b) To safeguard the fun~~damental rights and other rights and legitimate inter~~ests of the interested party recognized by Spanish law."

Article 39.2

The clause "como se recego" of this section does not correctly transpose article 38.2 of the Directive. That is why the following wording is proposed:

"2. Personal data will not be transferred if the competent authority of the transfer determines that the rights and fundamental freedoms of the interested party prevail over the public interest over the public interest in the transfer established in letters d) ~~and) of sect~~on 1."

Article 40.1

The use of the expression "direct transfers" in the heading is confusing and does not reflect sufficiently clearly the content of this article, referring to transfers necessary for the exercise of the functions of the competent authority, in cases particular and specific, when the addressee is not a competent authority, as can be seen from the first paragraph of article 39.1 of the Directive. This clarification should also be made in the drafting of the first section.

On the other hand, if the current wording is maintained, for better understanding of the section it should be replaced ". Y" for the punctuation mark ",".

That is why the following wording is proposed:

"Transfers of personal data to recipients established in third countries that are not competent authorities

1. Competent authorities may transfer personal data directly to recipients established in third countries that do not have the status of competent authority only if the other provisions of this organic law are met and all the following conditions are met:

VII

Chapter VI. Data protection authorities

Article 41.3

In the case of autonomous control authorities, it does not seem that the communication of the annual report should be made to the General Courts or the State Government, but to the autonomous assembly and the autonomous government. For this reason, it is proposed to replace the "y" with an "o". On the other hand, article 49 of the Directive also imposes the communication to the other designated authorities in the member state.

The following wording is proposed:

"3. The data protection authorities must produce an annual report on their activity, of a public nature and which must be made known to the Cortes Generales, the Government, or, as the case may be, the Legislative Assemblies and Governments of the autonomous communities, of the European Commission and the European Data Protection Committee, as well as the Ombudsman and similar autonomous institutions and the rest of the data protection authorities designated in Spain.

Article 42.4

For the purposes of correctly transposing article 46.4 of the Directive, a section 4 should be added to article 42 of the Project, with the following wording:

"4. When the requests are manifestly unfounded or excessive, especially due to their repetitive nature, the control authority may charge a reasonable fee based on administrative costs, or refuse to act on the request. The burden of demonstrating the manifestly unfounded or excessive character of the request will fall on the control authority."

Article 43

This article does not include the powers provided for in articles 47.2.a) (warning) 47.5 (exercise of actions and formulation of complaints before the jurisdictional bodies) and 57 (sanctioning power) of the Directive.

In any case, and in line with what was established in the opinion WP 258, it would seem advisable to make a referral to the powers conferred on the authorities by the RGPD.

Article 43.b)

The list of control functions established in this section is more restrictive than that made in article 47.2.b) of the Directive. On the other hand, this section includes the issuance of recommendations, which, given their non-binding nature, should appear in section c).

"b) To control what is required in this organic law, which includes ordering the person responsible or in charge of the treatment to make the processing operations conform to the provisions of this organic law, in particular, ordering to give access, rectify or delete the data or limit or prohibit treatment."

Article 43.c)

In accordance with what has been proposed with respect to article 43.b), a mention should be added to this section on the preparation of recommendations:

"c) Advisory, which includes the prior consultation provided for in article 29 of this organic law, the preparation of recommendations and the issuance, on its own initiative or prior request, of opinions destined to the Cortes Generales or the Government, to other institutions organizations or any citizen, about any matter related to the protection of personal data subject to this organic law."

Article 44.1 and 2

It is proposed to recast the current sections 1 and 2 of this article, and to add a new section 2 in order to specify the content of mutual assistance, in line with article 50.1 of the Directive:

"1. The Spanish data protection authorities may request and must provide the necessary assistance and cooperation to the data protection authorities of other States

members, having to respond to their requests without undue delay and within a maximum period of one month from receipt.

2. Mutual assistance will cover, in particular, requests for information and control measures, such as requests to carry out consultations, inspections and investigations."

VIII

Chapter VII. Claims

Article 44. bis

There is a lack of transposition of Article 48 of the Directive regarding the fact that Member States must provide that the competent authorities establish effective mechanisms to encourage the confidential notification of infringements of the Directive.

Article 45

This article provides that the procedure to which the claims that could be raised before the control authorities will be submitted, either because the rights of the interested parties referred to in articles 15 and 16 of this organic law have not been taken care of, or when the violation of the established therein is reported, it will be that regulated by Title VIII of Organic Law 3/2018, of December 5.

However, it should be noted that the procedure regulated in Title VIII of Organic Law 3/2018, of December 5, is only applicable to the Spanish Data Protection Agency (art. 63.1 LOPDGDD). For this reason, the wording of this article should be modified in the following sense:

"The procedure to which claims that could be raised before the control authorities will be submitted, either because the rights of the interested parties referred to in articles 15 and 16 of this organic law have not been met, or when the violation of what is established therein, will be regulated by Title VIII of Organic Law 3/2018, of December 5 or, as the case may be, in the corresponding autonomous legislation."

Articles 46 and 47

These articles respectively regulate the right to compensation for public and private sector entities. The system can be improved, because the decisive element for the distinction will be the specific regime for the person in charge of the treatment. For this reason, it is proposed that article 46 be devoted in general to the responsibility derived from the treatment, applicable to both those responsible and those in charge, and that article 47 be devoted to the specificities of those in charge.

On the other hand, as for the subjective scope of the forecast contained in section 2, in accordance with article 32 of Law 40/2015, it must also include the instrumental entities of the public administrations.

Finally, Article 46 also includes the responsibility of the control authorities, which is an issue that is not provided for in Article 56 of the Directive. Without prejudice to the general subjection of the authorities to the responsibility regime of public administrations, it would not be treated in any case of liability derived from the treatment, so it does not seem to make sense to include the control authorities in this article.

That is why the following wording is proposed:

"Article 46. Right to compensation

1. The interested parties will have the right to be compensated by the person responsible for the treatment or by the person in charge of the treatment when they suffer damage or injury to their goods or rights, as a result of non-compliance with the provisions of this organic law.

2. When it comes to files of a public administration or an instrumental entity thereof, responsibility will be required in accordance with the legislation regulating the responsibility regime provided for in Law 39/2015, of October 1, and in Law 40 /2015, of October 1, of the Legal Regime of the Public Sector.

3. When it comes to files of a judicial public authority, responsibility will be required in accordance with the legislation regulating the responsibility regime provided for in Organic Law 6/1985, of July 1.

Article 47. Right to compensation for those responsible for the treatment

1. The processing manager will be obliged to indemnify all damages and losses caused to the interested parties or third parties, as a result of the data processing operations provided for in the contract or another legal act signed in accordance with article 23 of this organic law.

2. When such damages and losses have been caused as an immediate and direct consequence of an order from the competent authority, it will be responsible, within the limits set forth in the laws.

3. The interested parties or third parties may require the person in charge of the treatment, within the year following the production of the deed, to report, once the person in charge of the treatment has been heard, about which of the contracting parties or those who have subscribed to the legal act, corresponds the responsibility for the damages. The exercise of this faculty interrupts the limitation period of the action.

4. The claim of the interested parties will be made, in any case, according to the procedure established in the legislation applicable to each case.

5. Regardless of what is provided in the previous sections, the person in charge of the treatment will also be responsible for the damages that are attributable to him that during the operations

of data treatment are caused to the person in charge of the treatment, by non-compliance with this organic law, by infractions of legal or regulatory precepts, or by non-compliance with the provisions contained in the contract or in another signed legal act."

Article 47. bis

A new Article 47.bis should be introduced to transpose Article 53 of the Directive (Right to effective judicial protection against a control authority).

"Right to effective judicial protection against a data protection authority

1. Without prejudice to any other administrative or extrajudicial remedy, any natural or legal person will have the right to appeal to the contentious administrative jurisdiction against a legally binding decision of a data protection authority that concerns them.

2. Without prejudice to any other administrative or extrajudicial appeal, any interested party shall have the right to file a contentious administrative appeal in the event that the data protection authority does not respond to a claim or does not inform the interested party within three months of the course or the result of the claim presented."

Article 47. ter

A new article 47.ter should be introduced for the transposition of article 54 of the Directive (Right to effective judicial protection against the controller or processor).

"Right to effective judicial protection against the person responsible or the person in charge of the treatment

Without prejudice to the administrative or extrajudicial resources available, including the right to file a claim before a data protection authority, all interested parties have the right to effective judicial protection if they consider that their rights established in this organic law have been violated as consequence of a treatment of your personal data that does not comply with those provisions."

Article 47. tetra

A new article 47.tetra should be introduced for the transposition of article 55 of the Directive (Representation of interested parties).

"The interested party will have the right to give a mandate to an entity, organization or non-profit association that has been properly constituted, whose statutory objectives are of public interest and that acts in the area of the protection of the rights and freedoms of those interested in matter of protection of his personal data, so that he presents the claim on his behalf, and exercises the rights contemplated in articles 46, 47, 47.bis and 47.ter of this organic law on his behalf."

Chapter VIII. Sanctioning regime

Article 48

Letter c) of this article includes among the responsible subjects the representatives of those responsible or in charge of the treatments not established in the territory of the European Union, without, unlike the RGPD, the obligation exists in the Organic Law, not even only the forecast, of the appointment of a representative.

On the other hand, letter d) refers to "The rest of the physical or legal persons bound by this organic law", without it being clear which people it is referring to.

Article 49

Section 1 establishes that "The facts likely to be qualified under two or more provisions of this or another law, as long as they do not constitute violations of the general regulations on the protection of personal data, will be sanctioned (...) .”

It does not seem clear the purpose of the reference to "the general regulations for the protection of personal data", especially because it seems that it should be understood as made in the RGPD and the LOPDGDD.

Articles 50 to 52

The classification of offenses made in these articles should be revised because the delimitation of the applicability of numerous classifications is not clear, so a generalized revision of the list of offenses would seem advisable. So, for example:

- **In numerous classifications, the seriousness of the offense is used to distinguish the application of a very serious, serious or minor offence, without providing criteria to determine the seriousness (e.g. 50.a), 50.c), 51.b), 51.d), 51.k), 51.po 52.e, 52.f, 52.g, 52.o))**
- **Article 50.c) refers to the consent requirements of the LOPDGDD, when this organic law does not apply in the scope of the Directive. Especially because Article 72, to which it refers, does not regulate the requirements of consent. This observation would be extended to article 51.d)**
- **Article 51.ñ) typifies the lack of cooperation, negligent action or the impediment of the inspection function of the competent authorities, when this organic law does not attribute these functions to the "competent authorities". They are attributed only to the data protection authorities, and the corresponding typification is already provided for in article 51.o)**
- **Article 51.p) typifies the access, assignment, alteration and disclosure of data outside of the cases authorized by the person responsible or in charge of the data, as long as it does not const**

criminal offense or very serious offence. The reference to the person in charge makes it unclear who would be the active subject of this infringement.

- Article 51.q typifies "Breach of impact assessment". Rather, it should refer to "the non-performance of the impact assessment when mandatory". This observation would be extended to article 52.g).
- Article 52.k) typifies "Breach of the obligation of the person responsible for the treatment to inform the person responsible for the treatment about a possible infraction of the provisions of this organic law, as a consequence of an instruction received from this.", when in the text of the Organic Law this obligation has not been foreseen.
- Article 52.e) duplicates Article 52.m)
- In article 52.m) the punctuation mark "." should be deleted. And be replaced by "," for the proper understanding of this article.

A revision and simplification of the list of offenses provided for in the Law is therefore proposed.

Article 54.2

In the case that the infringing subject is not one of the public entities referred to in article 77 LOPDGDD, article 54.2 provides for a scale of sanctions (from 6,000 to 240,000 euros) significantly less than those established in the RGPD , but also of those established by the LOPD, without the characteristics of the information being processed or the consequences that the treatment may have for the affected persons justifying such a reduction.

X

Other provisions

Single repealing provision

a) Impact of the LOPD and Royal Decree 1720/2007

Despite the fact that the repealing provision expressly repeals certain provisions, it does not refer to the situation in which Organic Law 15/1999 remains. Although the single repealing provision of the LOPDGDD repealed this rule, the fourth transitional provision of the same maintained its validity temporarily until the regulations transposing Directive 2016/680 were approved. To clarify the situation, it could be positive to expressly repeal this rule, with the exception of articles 23 and 24 kept in force in the scope of the RGPD by the fourteenth additional provision of the LOPDGDD. In this sense, for the purpose of being able to completely repeal the LOPD, a modification could be introduced in the LOPDGDD to include the provisions of articles 23 and 24 LOPD in the part that do not refer to treatments in the police field, already that the limitations to the exercise of rights in the police and criminal judicial sphere are already regulated in this Draft Law.

The repeal or, if applicable, the partial validity of the RLOPD should also be clarified.

b) Repeal of Organic Law 4/1997, of August 4, which regulates the use of video cameras by the Security Forces and Bodies in public places

The single repealing provision expressly repeals Organic Law 4/1997, of August 4, which regulates the use of video cameras by Security Forces and Bodies in public places and its development regulation.

However, it should be noted that the draft text does not contain any specific regulation of police video surveillance in public places.

Taking into account some of the issues already raised in STC 37/1998, it would seem appropriate that the Preliminary Project establish the conditions and specific guarantees so that the use of video surveillance systems can be carried out in public spaces, given the particular interference that these systems may entail for citizens' liberties. In this sense, what is established in the preamble of Law 4/1997 is fully valid:

"Now it is opportune to proceed with the regulation of the use of the means of recording images and sounds that have been used by the Security Forces and Cuerpos, introducing the guarantees that are necessary so that the exercise of the rights and freedoms recognized in the Constitution be maximal and not be disturbed with an excess of zeal in the defense of public security."

This interference is even more aggravated, if possible, given the advances made in the degree of resolution of the captured images, the potentialities for the capture of sound or the association of the capture of images with facial recognition systems or others of a biometric natur

Given these risks, the LOPDGDD specifically regulates the use of video surveillance systems to guarantee the safety of people and property in establishments and facilities (art. 22) and also in the workplace (art. 89). It would also seem reasonable for the Draft to include a specific regulation in the police field to regulate the conditions and guarantees for the use of these systems.

First and second final provision

This Authority cannot pronounce on the first final Provision of the Law (nature of the Law) and second (jurisdiction title), since the wording itself contained in the Preliminary Project indicates that it must be completed.

Eighth final disposition.

Since in practice some doubts have been raised in relation to the applicability in the tax field of the possibility for the public administration to collect from the Administration those documents that the citizen is obliged to provide and that are in their possession of the Tax Administration (arts. 28.2 and 28.3 of Law 39/2015, of October 1, on common administrative procedure of public administrations), it would be clarifying if an express acknowledgment to that effect were included in the amendment made to article 95.1 LGT with the following wording:

"d) The collaboration with the public administrations for the fight against fiscal crime and against fraud in obtaining or receiving aid or subsidies from public funds or from the European Union, as well as for the effectiveness of the right not to contribute documents required by the regulations, drawn up by the tax administration or that are in their possession."

Seventh additional provision

The considerations made regarding the eighth additional provision would also be transferable to the modification of article 77.1.d) of Royal Legislative Decree 8/2015, of October 30, which approves the revised text of the General Law of Social Security, which is foreseen in the seventh Additional Provision of the Preliminary Project.

Transitional right

The transitional regime for activities started before the entry into force of the Organic Law should be clarified. For these purposes, special consideration should be given to what is established by recital 96, as well as the specific provisions for the enforceability of the register of operations established by sections 2 and 3 of article 63. In this regard, the section 2 establishes that the Member States may provide that exceptionally and when it involves a disproportionate effort, the automated processing systems established before May 6, 2016 are in accordance with article 25, paragraph 1 (log of operations), before the May 6, 2023.

Barcelona, April 24, 2020